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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THE NATIONAL BANK OF COMMERCE, a corporation,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. 2458

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

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STATEMENT OF FACTS.

During the years 1907, 1908 and 1909, M. P. McCoy was an Examiner of Surveys and Special Disbursing Agent for the United States with headquarters at Seattle (see Trans. p. 37). McCoy's

official duties required him to go into the field in various parts of Washington, Oregon, Idaho and Montana and run over again one-tenth of the lines run by surveyors who made surveys of public land under contract with the government in order to check up their work (see Trans. p. 57). To pay for his expense in so doing, money to his credit as Special Disbursing Agent was deposited from time to time with the defendant, a national depositary. McCoy was authorized to use the money only for the purpose of paying such expenses (see Trans. pp. 41 and 42). When he made a payment he was required to take the signature of the person he paid on a voucher and give him a check on said account in the defendant bank for that amount (Trans. bottom of p. 41 and top of p. 42). Each week, as required by the Government, he sent a report to the Government covering his work (Trans. bottom p. 44 and top p. 45) and each quarter he submitted an expense account to which was attached these vouchers (Trans. top p. 45 to top p. 46). Also each quarter the defendant bank sent to Washington the cancelled checks which were covered by McCoy's account (Trans. p. 70 near the bottom to p. 71). McCoy, instead of doing the work on the

surveys in 1907, 1908 and part of 1909, falsified his reports to the Government and made fraudulent checks purporting to pay for work which was never performed (Trans. 58-59). He forged vouchers for the amounts of the checks in the names of fictitious persons (Trans. bottom p. 72 and p. 73), made the checks payable to the same names, forged the names of the fiitctious payees to the endorsements of the checks, and deposited the checks in other banks to the credit of fictitious payees. He assumed two fictitious names. Under the name J. G. King, he opened an account with the Columbia Valley Bank of Wenatchee and the Montana National Bank of Montana by correspondence, sending the checks to those banks by mail. With the Seattle National Bank he opened an account under the name of F. M. Clark, and he went personally to the bank for that purpose (Trans. pp. 64-66). None of the banks required that the payee named in the checks be identified. Those banks forwarded the forged checks to the defendant, and the defendant paid them. McCoy obtained money out of these other banks by forging checks in the fictitious names of the depositors therein (Trans. pp. 64-66, 68 near

bottom to 69) and deposited the money in his own personal account and used it (Trans. p. 80).

One W. G. Good, as special agent of the Government, was finally sent out to investigate McCoy's work about September, 1909, and found that the services McCoy claimed to have rendered had never been performed; that the vouchers covering these checks in question were false and the person's name therein fictitious (Trans. pp. 102 near bottom to 107 bottom). At the time Good made his investigation, the fraudulent checks for the months of July and August, 1909, were still in the defendant bank and had not yet been sent to Washington (Trans. pp. 104 and 118). McCoy confessed, was indicted and plead guilty. Good, during the investigation, obtained from the bank the checks for the two months of July and August, 1909, notified the bank that they were all fraudulent, as he says, "gave them the history of the whole case," and returned the checks to the possession of the bank (Trans. 113 near bottom to 115).

On March 4, 1910, the United States Attorney for the Western District of Washington made a demand for the repayment of the $15,129.81 herein

sued upon, attached to his demand a list of the checks with their description and notified the defendant that its officers and attorneys would be allowed to inspect the checks. The bank later sent an officer to inspect the checks and he did so (Trans. pp. 116 and 117). The bank refused to repay the money and this action was instituted.

The defendant's answer, after denying and admitting certain allegations of the complaint, interposed three defenses as follows:

> "1. That the deposits so made by the plaintiff with the defendant in favor of M. P. McCoy, as such Examiner of Surveys and Special Disbursing Agent, were made in the usual and customary manner, as deposits are usually, ordinarily and customarily made by any individual depositor, and that the relation of debtor and creditor was created between the plaintiff and the defendant by reason of such deposits, and that it became the duty of the defendant to pay the checks drawn by the said McCoy against said deposits, and that all checks drawn by the said McCoy against said deposits were paid from time to time as the same were presented for payment, and that it was not the duty of the defendant to inquire as to the name of the payee of such checks and that all checks paid by the defendant as referred to in the complaint were duly and regularly signed with the genuine signature of the said McCoy, as Examiner of Surveys and Special Disbursing

Agent, and that monthly statements were rendered to plaintiff and to the said McCoy showing the amount of each check drawn by the said McCoy against said deposits and the aggregate of such checks, and that such monthly statements were duly and regularly rendered in conformity with the usual custom of bankers, and that no complaint of any kind was made to the defendant by the plaintiff as to the improper payment of any checks by reason of forgeries, fictitious payees, or otherwise until the 5th day of March, 1910. That it was the duty of the plaintiff upon the return of the vouchers of said McCoy and upon the rendition of statements of his account to have examined said account and to have promptly notified the defendant of the alleged forgeries or fraud, if any there were. That the failure on the part of the plaintiff to promptly notify the defendant of the alleged forgeries or fraud, if any there were, resulted in damage and injury to the defendant in a sum in excess of the amount sued for by the plaintiff in this action, and that the defendant was damaged by such negligence on the part of the plaintiff in failing to notify the defendant of the alleged forgeries promptly, in that the defendant would have been able—if the forgeries had been promptly made known to the defendant—to have prevented any of the forgeries except the first one, or the ones that occurred during the first month of the period during which said forgeries are alleged to have been committed; and that by reason of the failure of the plaintiff to so promptly notify the defendant of the fraud of the said McCoy the defendant is precluded from asserting any claim that it may have had against the various

banks which forwarded the checks in question to the defendant for payment, and that by reason of the plaintiff's failure to so notify the defendant of such fraud on the part of said McCoy within a reasonable time after said checks were paid and a statement of the account of the said McCoy, together with the vouchers, was sent by the defendant to the plaintiff, the said plaintiff is barred and estopped of any right it may have had, if any, to maintain this action for the recovery of the money prayed for in the complaint.

2. That the money sued for in this action, whether paid to fictitious payees or otherwise, was expended and used by the said McCoy in payment of claims against the United States and in pursuance of the laws of the United States, and in payment of claims that the said McCoy as Examiner of Surveys was authorized to make and pay on behalf of the United States.

3. That subsequent to the issuance of the checks described in the complaint and their payment by the defendant, the plaintiff, with full knowledge of the facts, ratified and approved the action of M. P. McCoy in drawing such checks in the way in which they were drawn, and the action of the defendant in paying them and charging the amounts thereof to the account of the plaintiff, carried on the books of the defendant in the nam eof M. P. McCoy as Examiner of Surveys and Special Disbursing Agent."

DEFENDANT'S SECOND AFFIRMATIVE DEFENSE.

In the second affirmative defense the defendant alleges that the money was expended by McCoy in payment of claims against the United States created by him under authority of the United States and which he was authorized to make and pay on behalf of the United States.

To sustain this defense the defendant must prove that a certain amount of the proceeds of these fraudulent checks was used to pay legitimate expenses of the Government. The evidence shows that the witness could not fix any amount. Thus in the transcript on pages 59 and 60 the testimony is as follows:

> "Q. You did no work?
>
> A. I was doing work, but instead of passing checks to the parties that I employed in the field, I would pay them personally.
>
> Q. How much did you pay out in that way?
>
> A. I am unable to state.
>
> Q. About how much would these checks amount to, fifteen thousand dollars, about how much did you expend out of your own funds?
>
> A. I don't think I could even approximate it.

* * * * * * *

Q. You think that you have spent about a couple of thousand, or it may be more?

A. It may be more or it may be less."

If the witness cannot fix the amount, certainly a court or jury cannot do so. That is certain which can be made certain, but the only way whereby this amount could be made certain would be for the jury to be sleight-of-hand artists and so be able to pull from the mouth of the witness facts that were never there. He entirely fails to show that any legitimate claims were paid from the proceeds of these fraudulent checks. Thus see transcript, pp. 80 and 81, where the following language is used:

"A. I paid them with my own money. How I obtained that money, I obtained part of it by my own salary and overtime and part of the money I got from the fraudulent checks.

Q. You kept all of this money in the bank?

A. Yes, sir.

Q. The National Bank of Commerce?

A. Yes, sir.

Q. When you got money from these fraudulent checks and legitimate money, you put them all together in one account?

A. Yes, sir.

Q. Whether it was from one source or the other, part was from fraudulent sources and part from other sources?

A. Yes, sir.

Q. You could not tell which?

A. No, sir.

* * * * * * *

Q. So that you would say that the biggest part of what you did pay necessarily came from the money that you got on these fraudulent checks, that is the legitimate conclusion, is it not?

A. Well, the amount was so small that I was paying out, compared with what I was getting in, that I would not have any means of knowing where it did come from.

Q. It was all mixed together?

A. Yes, sir."

The defendant cites no law to sustain his contention—we need none to refute it.

FICTITIOUS PAYEES.

The defendant contends that the checks in question were in legal effect negotiable instruments, payable to bearer, and that no liaability resulted to the defendant bank in paying the checks as they did, even though the money was in the end misappropriated by McCoy to his own use and base

their contention on the *Rem. & Bal. Code,* which provides as follows:

> "A bill of exchange is payable to bearer: 'When it is payable to the order of a fictitious or non-existing person and *such fact was known to the person making it so payable.*' "

2d Rem. & Bal. Code, Sec. 3400, Sub-div. 3.

The defendant maintains that the legal title to the money was in McCoy. They overlook the fact that a deposit in the name of any Government agent is the same as if it were in the name of the Government itself. The money was not McCoy's. It was given to him by the Government to expend for certain purposes known to the bank. If the bank had failed it would have been the loss, not of McCoy, but of the Government. So the money was in legal effect to the credit of the Government and the Government was the depositor. Nothing that McCoy could do with this money within the scope of his duties could redound to his personal benefit or result in a personal loss and so if the Government was the real owner and depositor of the money, on the same principle, the United States was the real maker of any checks drawn on this fund.

Although these checks were signed by McCoy "M. P. McCoy, Examiner of Surveys and Sp. D. A." the Government was the maker of these checks, under the familiar exception to the general rule of agency that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal, even where they are signed by the agent personally.

Jones vs. LeTombe, 3 Dallas 383, 1 L. Ed. 647;

Armour vs. Roberts, 151 Fed. 846, 852;

Hodgson vs. Dexter, 1 Cranch 345, 2 L. Ed. 130;

Garland vs. Davis, 4 How. 131, 148; 11 L. Ed. 907;

29 *Cyc.* 1446-7.

Thus in *Hodgson vs. Dexter, Supra,* the defendant, then late Secretary of War, was sued for breach of a covenant on a certain lease in that the buildings on the premises had been destroyed by fire. In the body of the lease the covenantor was described as "Samuel Dexter, of the same place, Secretary of War," the covenant purported to run from "the said Samuel Dexter, for himself, his

heirs, executors, administrators and assigns," and the indenture was signed "Samuel Dexter, Seal." Of this indenture the Chief Justice says at pages 363-365 (L. Ed. 136-137):

> "It appears, from the pleadings, that Congress had passed a law authorizing and requiring the President to cause the public offices to be moved from Philadelphia to Washington; in pursuance of which law, instructions, by the President, were given, and the offices belonging to the Department of War were removed; that it became necessary to provide a war office, and that for this purpose and no other, the agreement was entered into by the defendant, who was then at the head of this department. During the lease, the building was consumed by fire.
>
> It is too clear to be controverted, that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government, are public and not personal.
>
> They enure to the benefit of, and are obligatory on, the government; not the officer.
>
> A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account."

In the *Hodgson* case just quoted it will be noted that the agent signed the contract personally and not officially and that, too, under seal.

Now under the statute, knowledge that the payees were fictitious must be brought home to the Government, the maker of the checks, and for McCoy's knowledge of this fact to be the Government's knowledge, he must have acquired such knowledge while acting within the scope of his duties as Special Disbursing Agent of the Government. And he was not acting within the scope of his duties for two reasons: first, that McCoy obtained his knowledge that these payees were fictitious while he was engaged in a scheme to defraud the Government and, second, that the regulations of the Treasury Department which had the force of law and of which the court takes judicial notice, prohibit the execution of commercial paper of a disbursing agent in the name of a fictitious payee.

The law sustaining the first reason is well stated by Pomeroy in his *Equity Jurisprudence,* where he says in Vol. 2, Section 675:

> "It is now settled by a series of decisions possessing the highest authority, that when an

> agent or attorney has, in the course of his employment. been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed."

In *National Bank of Commerce vs. Tacoma Mill Co.* (1910), 182 Fed. 1, 11, the court says that the principal "cannot be held liable for the deceitful and dishonest acts of his agent, for the simple and very potent reason that the agent is not his agent for such purposes. As to them, the agent is acting wholly without the scope of his authority."

It is a general rule of the law of agency that a principal is bound by the knowledge of his agent for the reason that the law presumes the agent has discharged his duty of communicating his knowledge to his principal. An exception to the rule is when the agent is engaged in committing an independent fraudulent act for his own benefit and is based on the grounds that where one in transacting the business of his principal is committing

a fraud for his own benefit, he is not acting within the scope of his duties as his principal's agent, and, also, that it cannot be fairly presumed that an agent will communicate to his principal a fraud intended for his own and not his principal's benefit when the disclosure itself would expose and defeat his fraudulent purpose.

As to the reason that where one in transacting the business of his principal, is committing a fraud for his own benefit, he is not acting within the scope of his duties as his principal's agent, a most cogent and convincing authority will be found in the case of *United States vs. National Bank of Commerce* (C. C. A., Ninth Circuit, 1913), 205 Fed. 433, at page 438, where it is said:

> "He was the Government's agent, it is true, but he was not its agent to draw checks to fictitious payees. In drawing such checks, he was not only acting without authority, but in violation of his instructions, and in fraud of his principal. That the knowledge of the agent is not in such a case the knowledge of the principal is held in the following cases: *Harmon vs. Old Detroit National Bank,* 153 Mich. 73, 116 N. W. 617; *Shipman vs. Bank,* 126 N. Y. 318; *Armstrong vs. National Bank,* 46 Ohio St. 512; *Chism vs. First National Bank,* 96 Tenn. 649."

As to the second reason, that the regulations of the Treasury Department which had the force of law and of which the court takes judicial notice, prohibit the execution of commercial paper of a disbursing agent in the name of a fictitious payee, the best authority will be found in the case of *United States vs. National Bank of Commerce, Supra,* at page 438, where the following language is used:

> "The defendant bank, as a national depositary, was chargeable with notice of the limitations of McCoy's authority to check out the public money deposited with it. Section 5153 of the Revised Statutes (U. S. Comp. St. 1901, p. 3465), provides:
>
> 'All national banking associations, designated for that purpose by the Secretary of the Treasury, *shall be depositaries of public money* * * * *under such regulations as may be prescribed* by the Secretary.'
>
> One of the regulations promulgated by the Secretary of the Treasury on April 16, 1903 (Department Circular No. 49, Sec. 6), provides:
>
> 'If the object or purpose for which any check of a public disbursing officer is drawn is not stated thereon, as required by departmental regulations, or if any reason exists for suspecting fraud, the office or bank on which such check is drawn will refuse its payment.'

Department Circular No. 102, issued on December 7, 1906, contained the following:

'Any check drawn by a disbursing officer upon moneys thus deposited, must be in favor of the party, by name, to whom the payment is to be made, and payable to 'order,' with these exceptions.'

The exceptions are not material to the present case. In *The Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169, it was said:

'Whenever negotiable paper is found in the market purporting to bind the Government, it must necessarily be by the signature of an officer of the Government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the Government.' "

For additional authority to sustain this last reason, although we deem it unnecessary, see the following cases:

Marsh vs. Fulton County, 10 Wall. 676, 683;

The Mayor vs. Ray, 19 Wall. 468, 478;

Merchant's Bank vs. Bergen County, 115 U. S. 384, 390-391;

Pine River Logging Co. vs. U. S., 186 U. S. 279, 291.

And so, under the doctrine laid down in *The Floyd Acceptances, Supra*, and this case on the former appeal, not only this defendant bank, but

every person dealing with McCoy's paper was required to ascertain at his peril, the agent's authority to execute the same. They were required to know as a matter of law that if the name of the payee on McCoy's check was not the name of the *real person* who rendered the service, or delivered the article for the use of the Government, it must be the name of McCoy.

We believe that it admits of no question that McCoy lacked authority to issue a check payable to a fictitious payee. The provisions of Department Circular No. 102, issued on December 7, 1906, are to the effect that *any* check drawn by a disbursing agent *must* be in favor of the party, *by name,* to whom the payment is to be made and payable to "order" because of the requirements by banks in such cases that the payee be identified and the authenticity of his signature established. Such precautions are no more and no less than the contract which the defendant bank and every other bank dealing with this paper engaged to perform. It is the violation of that duty which is the proximate cause of the loss in this case and the defendant is liable.

The case of *United States vs. National Exchange Bank,* 45 Fed. 163, is clearly distinguishable from this case. There the Postmaster did not attempt to commit a fraud as McCoy did here, but was defrauded. There the check was made payable to the party entitled to receive the money and delivered to a party not entitled to it. The Postmaster acted in good faith both in the issuance and delivery of the check. He did not act in bad faith as in this case. In that case the Postmaster identified the payee as is required, in this case the payees were not identified. If the bank had required identification of the payees the loss would not have been sustained. In that case the Government agent was acting within the scope of his employment and in good faith and was defrauded, here, the agent was acting outside the scope of his employment and is attempting to defraud.

DUTIES OF BANK AND DEPOSITOR.

A. Examination of Pass Book by Depositor.

An examination by the depositor of his pass book and checks is all the law requires, and where such examination, as in this case, would have disclosed no irregularities to the Government, the

record need not show whether such examination was or was not made.

Thus in *Leather Manufacturers' Bank vs. Morgan,* 117 U. S. 96, 117, 29 L. Ed. 811, 819, the court says:

> "From *Welsh vs. German-American Bank,* it is clear that the comparison by the depositor of his check book with his pass book would not necessarily have disclosed the fraud of his clerk; for the check when paid by the bank was, in respect of date, amount, and name of payee, as the depositor intended it to be, and the fraud was in the subsequent forgery by the clerk of the payee's name. As the depositor was not presumed to know, and as it did not appear that he in fact knew, the signature of the payee, it could not be said that he was guilty of negligence in not discovering, upon receiving his pass book, the fact that his clerk or some one else had forged the payee's name in the indorsement."

B. Independent Investigation of Depositor.

Counsel attempted to put into this record facts indicating that the Government by some independent investigation could have determined whether or not McCoy was conducting his business for the Government in a regular manner, but such facts, even if established, cannot avail the defendant, for

the depositor owes the bank no duty even to search for or discover forged endorsements on his bills or checks (*National City Bank vs. Third National Bank,* 177 Fed. 136, 140) nor to conduct an independent investigation in order to prevent the fraud of a dishonest agent (*National Bank of Commerce vs. Tacoma Mill Company,* 182 Fed. 1, 12-13).

The Government was not negligent in failing to discover these forgeries for the additional reason that the Government is not presumed, any more than any other depositor, to know the signatures of the payees of its checks.

United States vs. National Exchange Bank, 214 U. S. 302, 317, 53 L. Ed. 1006, 1012.

Leather Manufacturers' Bank vs. Morgan, 117 U. S. 96, 117; 29 L. Ed. 811, 819.

C. Bank's Negligence Caused Loss.

The opposing counsel maintain that had the Government exercised ordinary diligence no damage would have resulted.

It appears from the testimony in this case that McCoy deposited these checks in other banks where he gave a false name and that defendant bank paid them, relying on the endorsements of the other

banks. It does not appear that this defendant made any investigation whatever to determine the authenticity of the endorsements. It also appears that an examination of the cancelled checks and the bank's statement would not have revealed the irregularities of McCoy.

This contention of the plaintiff in error is best answered by the opinion of this court in *United States vs. National Bank of Commerce, Supra,* at page 436, where the court says:

> "The defendant contends that it may be sustained on the ground of the plaintiff's negligence in not discovering the frauds of McCoy sooner than it did. But the defendant having been negligent, and the negligence of the banks through which it received the checks being imputable to it, it is in no position to urge the negligence of the Government as a defense to the action. In the absence of knowledge to the contrary, the Government had the right to rely upon the assumption that the defendant as the depositary of public money would do its duty, and there was nothing in the case to indicate that its reliance was misplaced until it discovered McCoy's frauds.
>
> "Where a bank holds money of a depositor subject to check, it can be required to pay any valid check of the depositor, but it cannot charge against the depositor's account money paid upon a forged check, or upon a check to

which the bank has obtained title by way of a forgery.

"Of course, the Government was not chargeable with knowledge of the signatures of the payees of the checks of its disbursing agent. In *Leather Manf. Bank vs. Morgan,* 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, Mr. Justice Harlan said:

" 'If the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account.'

* * * * * * * *

"In *United States vs. National Exchange Bank,* 214 U. S. 302, 29 Sup. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184, the court said:

" 'The exceptional rule as to certain classes of commercial paper proceeds upon an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common sense view of their relation. To apply the rule, however, to the Government and its duty in paying out the millions of pension claims, which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties and would also require that to be assumed which the obvious dictates of common

sense make clear could not be truthfully assumed.'

"And the court held that the United States was not chargeable with the knowledge of the signatures of the persons entitled to receive pensions. If that be true as to the signature of checks made to pension claimants, by the stronger reason it is true in regard to payments made to unknown persons whose signatures are not on file in any department of the Government, as was the case of the payments made by McCoy to persons who worked in his employment."

DEMAND.

It is said by the defendant that it was the duty of the Government to have made a demand upon the defendant for the money and it has assumed this burden by making and pleading the demand; but it did not do so until six months after the discovery of the forgeries. Also that the recourse of the defendant bank against the forwarding banks from whom it received the checks is now doubtful and the defendant has sustained an injury, at least to the extent of rendering it extremely doubtful as to its rights of recourse against the forwarding banks.

This contention is against the overwhelming weight of authority. Thus see *United States vs.*

National Bank of Commerce, Supra, at page 435, where the following language is used:

> "We are unable to assent to the proposition that the possession of those checks by the defendant was necessary in order to enable it to maintain actions against the banks through which it received the same. The defendant made no demand for the checks, and made no offer to pay the money due the Government on condition that the checks be returned to it. Its refusal to pay was absolute and unconditional.
>
> "Its cause of action against the banks through which it received the checks with the forged indorsements arose immediately upon its payment thereof. Said the court in *Leather Manf. Bank vs. Merchant's Bank,* 128 U. S. 26-35, 9 Sup. Ct. 3, 4 (32 L. Ed. 342):
>
> "'One who by presenting forged paper to a bank procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which in equity and good conscience has never ceased to be its property. * * * There is no consideration for the payment, and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run immediately upon the payment.'"

And see further the other cases cited by the court in its opinion as follows:

United States vs. National Exchange Bank, 214 U. S. 302, 29 Sup. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184;

United States vs. National Park Bank of N. Y. (D. C.), 6 Fed. 852;

United States vs. Onondaga County Sav. Bank (D. C.), 39 Fed. 259; and

Onondaga County Sav. Bank vs. United States, 64 Fed. 703, 12 C. C. A. 407.

Again the court shows the unsoundness of the defendant's contention on page 437 of its opinion where it uses the following language:

> "It is not shown that the defendant has suffered any prejudice, or has been in any way injured by the delay of the Government in commencing the action. When the demand was made upon it for repayment, the statute of limitations had not run against the defendant's right of action against the banks upon which it had the right of recourse, and the allegation in the amended answer that by reason of the failure of the Government to notify the bank of McCoy's fraud within a reasonable time it had lost its right against the various banks through which the checks had been forwarded for payment is not sustained."

In addition to the defendant's contention in

this regard being answered by the law as given in the court's opinion it is answered by the facts as appears in the transcript on pages 114 and 115, which reads as follows:

"(Testimony of W. G. Good.)

Q. And you returned them to the bank?

A. I returned them to the bank, and after —I think it was after Mr. McCoy plead guilty and I advised them of what took place in connection with Mr. McCoy and that those checks were fraudulent and that he admitted it, and so forth.

Q. And you told the banking officers, did you, that the checks were fraudulent?

A. Oh, yes.

Q. And in what way they were fraudulent?

A. Yes, sir; I gave them the history of the whole case and the transactions in connection with my investigation at that time.

Q. You left the checks in their possession?

A. Oh, yes; I returned them."

Thus the bank knew the facts and its rights as soon as the Government.

This argument disposes of pages 42, 43 and 44 of the defendant's brief.

INSTRUCTIONS REFUSED.

First—First Instruction.

The argument on the first instruction (see pages 44 and 45 of defendant's brief) is answered by us in our argument on the second affirmative defense—see beginning of our brief.

Second—Second Instruction.

The part of the second instruction material to this argument is as follows:

> "I instruct you that the plaintiff cannot recover for the said sum of $5,718, and such sum must be deducted from the total amount of $15,129.81, for the reason that the judgment of conviction against the said M. P. McCoy upon said indictment conclusively established the fact that such sum of $5,718 was the money and property of the United States, and by filing such indictment against the said McCoy for such sum and procuring a conviction thereon, the United States elected to treat said sum mentioned in said indictment as its own property and thereby waived its claim for said sum against the defendant bank."

The instruction and the defendant's argument on it overlook the point that the facts which prove the indictment would also prove our complaint and *vice versa*. The facts are not inconsistent, but con-

sistent. You can prove both the civil action and the indictment by them. Defendant has mistaken the doctrine of estoppel, which he is endeavoring to invoke.

Estoppel is defined in *Williams vs. Supreme Council A. L. of H.*, 80 N. Y. App. Div. 402, 80 N. Y. Suppl. 713, as follows:

> "In the broad sense of the term 'estoppel' is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, *in pais.*"

Again it is defined in *Bouvier Law Dict.* and quoted with approval in *Coogler vs. Rogers,* 25 Fla. 853, 873, 7 So. 391, as follows:

> "The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part, or on the part of those under whom he claims."

Again, *Greenleaf on Evidence* gives a definition which is approved in *South vs. Deaton,* 113 Ky. 312, 320, 68 S. W. 137, 1105, and is as follows:

> "An estoppel arises: Where a man 'has

done some act which the policy of the law will not permit him to gainsay or deny.' "

"The purpose of all estoppels is to prevent duplicity and inconsistency." *Bower vs. McCormack*, 23 Gratt. (Va.) 310.

Estoppel "concludes the truth in order to prevent fraud and falsehood." *Van Rensselaer vs. Kearney*, 11 How. (U. S.) 297, 326, 13 L. Ed. 703.

It will be observed from these definitions that estoppel precludes the assertion of facts not law. *Moore vs. Willis*, 9 N. C .555.

The defendant is urging that we are to be bound in a civil action by a position of law that we maintained in a criminal case. Even if his contention were borne out by the record it would not be sound. It is the duty of the United States to prosecute criminals such as McCoy. It is to the interest of the defendant that these prosecutions be made. It does not lie in the mouth of the defendant to say, "You maintained a certain position in prosecuting a criminal and that works as an estoppel against you to prevent your recovery in a civil action."

The defendant says at page 50 of his brief, "The moment McCoy drew the checks and got the money it became the duty of the Government to

elect whether it would look to McCoy for the return of these funds or look to the bank. It could not do both." In this contention the defendant is wrong. Even if the Government had brought a civil action against McCoy it would not prevent a recovery from the bank. For the Government to recover from the bank it is necessary for McCoy to be in the wrong. But the Government merely prosecuted McCoy criminally as it was its duty to do. Does the defendant think for one instant that a court would sustain the proposition that either the State, United States or a private individual would lose any civil right because of their bringing a criminal to book? Does the defendant think that this would prevent duplicity and inconsistency or fraud and falsehood?

Sometimes money deposited in a bank is viewed as the property of the depositor and sometimes as a loan by the depositor to the bank. The fact is, the deposit of the money, whether it is a debt or property, is a conclusion of law from the fact. Thus in 5 *Cyc.* 517, it is said:

> "A bank may maintain two relations with a depositor, his debtor with respect to one thing and his agent with respect to another. Again, it may be his agent at one time and his debtor

> at another. When money is deposited in a bank it is said to be the debtor and the depositor the creditor. Yet in another sense the depositor is the owner and can at any time demand repayment."

Now in this case it is the fact that the money was deposited in the defendant bank and that McCoy misappropriated it as we set forth. It is consistent with our case to say that the money in the bank was the property of the United States and the bank our bailee, and that McCoy, our agent, through being our agent, wrongfully gets the money from the bank and misappropriates it. In such event both the bank and McCoy would be liable, the bank civilly, McCoy civilly and criminally. Or we can say that the bank is our debtor and McCoy wrongfully gets funds from the debtor. Under either theory both the bank and McCoy are wrong and can be sued.

But if we assume for the sake of argument that when the Government indicted McCoy it stated that the money taken by him was its own property. If that position were inconsistent with the one maintained in this case, it would not estop us. The facts that prove the indictment are the same that are

necessary to prove our complaint in this action, and the position we maintain in the indictment would be merely a different conclusion of law from the facts and it would certainly not estop us from going into a civil action and maintaining the other conclusion of law from the same facts, namely, that the bank and the depositor occupied the position of debtor and creditor. Pleadings such as indictments and complaints are part fact and part conclusions of law from facts. You can maintain different conclusions of law from the same set of facts in different civil cases, much less maintain an opposite position in a criminal case from one advocated in a civil case, provided only that it does not entail the falsification or change of your facts.

The purpose of estoppel is to prevent a man from coming into court on one day and swearing to certain facts and on the next, to maintain a different position, swearing to an opposite state of facts. If the doctrine of estoppel could be invoked at all in this case, the court would refuse to do so on the ground that it would be against public policy.

Third—Sixth Instruction.

The germane portion of the sixth instruction of defendant is as follows:

"The plaintiff instructed the defendant bank to honor all checks drawn upon said account by the said M. P. McCoy, as such Examiner of Surveys and Special Disbursing Agent, without limitation or condition, then I instruct you that defendant had the legal right to honor any checks so drawn by said McCoy regardless of the fact as to whether the payees were fictitious or otherwise, and if you find that such special instructions were given at the time of the opening of said account, then I instruct you that such special instructions would justify the defendant bank failing, if it did fail, to follow the general instructions issued by the Treasury Department of the United States."

The defendant on this branch of the case overlooks Section 5153 U. S. R. S., which provides that:

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; * * *"

And also the common law that the regulations of the Departments of Government made pursuant to law have the force of law and are judicially noticed by the court.

Caha vs. United States, 152 U. S. 211, 38 Ed. 415;

Cosmos Exploitation Co. vs. Gray Eagle Iron Co., 190 U. S. 301, 47 L. Ed. 1064.

If the facts could be twisted to mean what the defendant contends they do, he is checkmated by the law. If the Secretary of the Treasury had tried to give to McCoy instructions in a letter that were different from the Department Regulations, the court would have held that the instructions controlled and not the letter. The Secretary of the Treasury is limited in his authority just as McCoy was, and had no right to allow either McCoy or the bank to deal with Government money in any manner different from that prescribed by law. A letter written to McCoy, telling him that he was Disbursing Agent could not be construed by the most imaginative as being a Department Regulation. The word "regulation" has a well defined meaning that does not embrace such a letter as is here referred to. One of the reasons why "regulation" could not mean a letter is this, that the Department Regulations relate to all depositaries of public money and the Secretary of the Treasury has no right to discriminate in favor of a particular bank.

One of the Regulations (Department Circular No. 102, issued on December 7, 1906) provides that

"Any check drawn by a disbursing officer upon

> moneys thus deposited, must be in favor of the party, by name, to whom the payment is to be made."

That is, a disbursing agent has no authority to make checks payable to fictitious payees, the reason being that this would dispense with one of the safeguards against fraud—the identification of the payee. This rule is as much the law as Section 5153 and the Secretary of the Treasury has no more right to violate it than has the bank or McCoy. The power and authority of government officials is controlled entirely by public law and if the greatest or the humblest steps beyond his duty, he cannot bind the Government, and this the whole world knows because it is a matter of law.

Another answer. If we have not checkmated the defendant with the law, it seems to us that the facts have done so. The testimony shows that McCoy got a letter "that instructed me to sign checks as Special Disbursing Agent." He did not think there were any limitations placed on his authority in this letter. He does not say what the contents of the letter were because he could not remember them. He does not say, and the testimony cannot be construed to be, that the letter gave him the

authority to sign these checks in any manner different from that prescribed by law and the Department Regulations for the drawing out of Government money by disbursing agents. All the testimony shows is that the letter appointed him a Special Disbursing Agent. It did not put any limitations on his authority or refer to any because it was already covered by the law and Department Regulations.

The contention of the defendant is as ridiculous as if a corporation had written to a bank and told it to honor all checks made by its agent to pay for boots and shoes and later on had written a letter to John Smith, telling him that he was its agent and to go to the bank and show his authority, there being no limitation in the letter on the authority of John Smith; and as if the bank had later honored checks of John Smith for timber contracts and then solemnly maintained that the letter to John Smith contained no limitations on his authority, and they were therefore justified in honoring his checks for all purposes.

The testimony on this subject will be found on pages 69, 70, 83 and 84, and is as follows:

(Testimony of M. P. McCoy.)

"Q. The bank had no other instructions, except from reading your letter?

A. I don't know, but I presume—

Q. I don't want any of your presumptions —you don't know?

A. I don't know. That letter instructed me to sign checks as Special Disbursing Agent.

Q. No limitation was placed by that letter, or was placed on the bank by that letter, to paying any checks signed by you?

A. No, sir.

Q. There were no conditions, it had been remitted direct to the bank to take your signature, and directing you to draw it out upon your signature, that was the size of these instructions, was it not?

A. Yes, sir, the purport of them.

Q. That is the substance?

A. I don't remember the wording exactly, but that is the substance or object of the letter.

Q. To advise the bank that you had authority to draw any money placed to your credit as Special Disbursing Agent?

A. Yes, sir."

* * * * * * * *

Q. And your written instructions were to show your orders to the bank, were they?

A. I cannot recall exactly, but I was notified of this sum being placed to my credit in this bank.

Q. You were authorized to draw it out on your signature?

A. Yes, sir.

Q. You showed that to the bank?

A. Yes, sir.

Q. You didn't tell them anything about your being unlimited in your power to draw that money?

A. No, sir, I simply showed them my letter.

Q. The letter didn't contain any limitations on your powers?

A. No, sir.

Q. It was an unconditional authority?

A. Yes, sir, I think the checks were to be signed by myself as Special Disbursing Agent.

Q. With that exception there was no limitation?

A. No, sir.

Q. There was no limitation on the authority of the bank to pay you money?

Mr. FISHBURNE—Same objection, your Honor.

The COURT—Objection overruled.

Mr. FISHBURNE—Exception.

The COURT—Exception allowed.

A. No, sir. The letter gave me authority to draw it out myself on my own order, but I don't think I could have drawn any checks under that authority payable to myself.

Q. It didn't say anything about it at all?

A. Well, I was to draw this money as Special Disbursing Agent and I don't remember that it limited me at all.

Q. You don't think that anything was stated as to any limitation at all?

A. I don't think that there was any limitation stated."

If we could override the law we should have material testimony to do so. Even in a State court such testimony as this would not be allowed to go to a jury. Besides this, where there is a conflict between statutory law and facts, the court must enforce the law, and it is not proper for a jury to determine which should control.

FOURTH—THE SEVENTH INSTRUCTION.

As to the seventh instruction, the reason it should not be given is covered by previous argument.

FIFTH—EIGHTH INSTRUCTION.

This instruction is also covered by previous argument.

NEW TRIAL.

A. RECORD SHOWS NEW TRIAL SHOULD BE DENIED.

The contention of the defendant in his motion for a new trial is set forth in his brief on page 61 (near the bottom) and page 62.

The affidavit of the officer of the bonding company shows that the bond of McCoy was conditioned as follows:

> "And conditioned upon the faithful performance of the duties of the said McCoy as Special Disbursing Agent and Examiner of Surveys for the United States in the States of Washington, Montana and Idaho, said bond being in the penalty of Three Thousand Dollars ($3,000)."

The affidavit further states that after being notified of default on bond the affiant did, on the 5th day of January, 1910,

> "pay to the said United States in full settlement of its liability under said bond aforementioned the sum of Three Thousand Dollars ($3,000) for which it holds the receipt and release of the said United States of and from any liability against it on account of said bond."

The record further shows on pages 183 and 184 that the Three Thousand Dollars paid by the bonding company was credited on the salary that was paid to McCoy himself and no part of it on these fraudulent checks. Even if we had a right in this

action to inquire into a contention between the bonding company and the United States, we are sure that the Government could so apply this money. The bond was conditioned upon the faithful performance of McCoy of his duties as Examiner of Surveys as well as Special Disbursing Agent. It was a violation of both duties to pay himself money for work that he never did, for surveys to make which he never even went on the ground.

Thus see the Record, at page 60, which reads as follows:

(Testimony of M. P. McCoy.)

"A. Only a part of them. I did a few of them.

Q. You were on all of them, were you not, with the exception of the one in northern Montana?

A. No, sir.

Q. How many all together?

A. I am unable to approximate. The records of the office will show, and I could not even approximate without having those records."

Again, see on pages 61 and 62 of the record in the same testimony, which is as follows:

"A. Well, in quite a majority I did not examine in the field at all.

Q. Didn't do any field work at all?

A. No, sir.

Q. You had nobody do it?

A. No, sir.

* * * * * * *

Q. And during this time, a period of two years, you simply copied the notes from the Surveyor General's office?

A. They were not copied, they were faked, we made our—"

The record shows that McCoy was getting Two Hundred and Seventy-five Dollars ($275) a month, so according to the record the Government lost more than the three thousand dollars on the breach of McCoy's duty as Examiner of Surveys and Special Disbursing Agent.

The record does not show that the bonding company, when it paid the money, stated on what portion of McCoy's defalcations the money should be applied and counsel will concede the rule that a debtor can apply money paid on an obligation to any portion of it that he desires—if an old account on the older items of the account, and so on. So here the Government had a right and did apply the three thousand dollars on the liability arising from

that breach of duty of McCoy's as to the payment of his own salary. Even if it had been improperly so credited that was *res inter alios acta.* The bonding company alone could complain and not this bank.

B. Doctrine of Subrogation Not Applicable to a Wrong Doer.

The doctrine of subrogation cannot be invoked in favor of a wrong doer. The fundamental principle underlying our recovery in this action, is that the Natinoal Bank of Commerce wrongfully paid out money on these forged checks.

Suppose that our surety company bond covered the total amount sued on by the Government, and that the United States had been paid by the bonding company for the total amount of McCoy's defalcations. It is just, and a court of law and equity would apply the rule, that the bonding company would be subrogated to the rights of the United States, and would have a right of recovery against the National Bank of Commerce for the total amount of the forged checks.

Now suppose, for the sake of argument, that the United States collected from the bonding company the total amount of its bond, and then sued the bank for the total amount of this indebedness and recovered it from the bank, then the law is, that the surety company would have a right to sue the United States for the total amount collected from the bank. But the rule cannot be reversed. The bank cannot come in and tell the United States what it and the bonding company shall or shall not do. The bank is a wrong doer. It is not subrogated to the rights of the United States, and could not bring an action against the bonding company under this doctrine of subrogation.

We think these reasons are sufficient for the court to deny a new trial and make it unnecessary to give the subsequent ones, but as they exist, in order to exercise reasonable care, we will give the others.

C. The Matter Set Out In Affidavit Not Within Issues of Original Trial.

It is a well settled principle of law that in a motion for new trial, the attorney cannot set out

new matter that would be inadmissible unless the pleadings in the case were amended. The reason for the rule is that otherwise law suits would never be settled. This case is a fair example of the principle. We have a first trial, an appeal, and then a second trial, and after the second trial counsel endeavors to set up matter that could not be admitted under their answer without amending it.

D. Lack of Diligence.

Another reason why the motion would have to be overruled, is that there has been a lack of diligence on the part of Mr. McCord. The court will take judicial notice of the fact that it is known that all government disburesing agents have bonds, and an attorney should inquire to find out what steps have been taken on the bond. This must be done at the time of the trial, and certainly cannot be done after a period of several years has elapsed and the case gone to the Circuit Court of Appeals and come back for re-trial. The court by granting this motion would sacrifice the desire to terminate litigation within some reasonable time, to giving the attorney for the defense a possible chance of proving an issue which was never set up in the action.

IN CONCLUSION.

There was no dispute over the facts in this case and so there was no necessity for submltting it to a jury. There was little conflict over the law and so there was less necessity for an appeal. Most of the points have already been decided in our favor on the former appeal and they are more untenable now than they were at that time, because in addition to their being against the overwhelming weight of authority, they fall athwart the doctrines of *res adjudicata* and *stare decisis.* This is more in the nature of a petition by the defendant for a rehearing than an appeal and lacks the merit of presenting any cases in their favor which have been decided subsequent to the court's former ruling, or any alteration of circumstances except the elapse of a long period of time, which is an argument in our favor rather than theirs . The new points that are not merely collateral to and controlled by the former decision impress us as being unsound and non-negotiable on their face.

On account of all of these things we respect-

fully submit that the lower court should be sustained and this appeal dismissed.

Respectfully submitted,

CLAY ALLEN,
United States Attorney.

G. P. FISHBURNE,
Assistant United States Attorney.